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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 DAVID L. REED,

7 Plaintiff,

8 v.

9 NORTH LAS VEGAS POLICE
10 DEPARTMENT, et al.,

11 Defendants.

Case No. 2:18-cv-01847-APG-DJA

ORDER

12 Presently before the court is pro se prisoner David L. Reed's Motion/Application for
13 Leave to Proceed *in forma pauperis* (ECF No. 9), filed on December 26, 2018. Reed submitted
14 the declaration required by 28 U.S.C. § 1915(a) showing an inability to prepay fees and costs or
15 give security for them. Reed's request to proceed *in forma pauperis* therefore will be granted.
16 The Court now screens Reed's amended complaint (ECF No. 16) as required by 28 U.S.C. §§
17 1915(e)(2) and 1915A.

18 **I. ANALYSIS**

19 **A. Screening Standard for Pro Se Prisoner Claims**

20 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks
21 redress from a governmental entity or officer or employee of a governmental entity. *See* 28
22 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any
23 claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
24 monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),
25 (2). In addition to the screening requirements under § 1915A, the Prison Litigation Reform Act
26 requires a federal court to dismiss a prisoner's claim if it "fails to state a claim on which relief
27 may be granted." 28 U.S.C. § 1915(e)(2); *accord* Fed. R. Civ. Proc. 12(b)(6). To state a claim
28 under 42 U.S.C. § 1983, a plaintiff must allege "(1) the defendants acting under color of state law

1 (2) deprived plaintiffs of rights secured by the Constitution or federal statutes.” *Williams v.*
2 *California*, 764 F.3d 1002, 1009 (9th Cir. 2014) (quotation omitted).

3 Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for
4 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668
5 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain sufficient
6 factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *See*
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints and
8 may only dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in
9 support of his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908
10 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

11 In considering whether the complaint is sufficient to state a claim, all allegations of
12 material fact are taken as true and construed in the light most favorable to the plaintiff. *Wylar*
13 *Summit P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
14 Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
15 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
16 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*
17 Unless it is clear the complaint’s deficiencies could not be cured through amendment, a pro se
18 plaintiff should be given leave to amend the complaint with notice regarding the complaint’s
19 deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

20 **B. Screening the Amended Complaint**

21 Plaintiff filed an Amended Complaint (ECF No. 16) on February 18, 2020. As it
22 supersedes his original Complaint, the Court will only screen the Amended Complaint. Plaintiff
23 sues three North Las Vegas police officers in addition to the North Las Vegas Police Department
24 for utilizing excessive force and conducting an illegal search and seizure in violation of the 4th
25 Amendment, along with discriminating against him based on his race in violation of the 14th
26 Amendment. Plaintiff seeks compensatory damages of \$100,000 against each of the individual
27 police officers and \$300,000 against the North Las Vegas Police Department, punitive damages
28

1 of \$150,000 against two of the officers and \$50,000 against the third along with \$300,000 against
2 the Department.

3 To state a claim under Section 1983, a plaintiff must allege that a right secured by the
4 Constitution has been violated and the deprivation was committed by a person acting under color
5 of state law. *See, e.g., Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir.1986); *West v. Atkins*, 487
6 U.S. 42, 48 (1988); *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.2006). States
7 and state officers sued in their official capacity are not “persons” for the purposes of a section
8 1983 action, and generally, they may not be sued under the statute. *Will v. Mich. Dept. of State*
9 *Police*, 491 U.S. 58, 71 (1989). However, Section 1983 does allow suits against state officers in
10 their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 26 (1991). Liability can attach to an
11 officer in his individual capacity if the plaintiff is able to establish: (1) that the official caused the
12 deprivation of the plaintiff’s rights while acting personally under color of state law, and (2) that
13 the official is not entitled to the protection of qualified immunity. *See Kentucky v. Graham*, 473
14 U.S. 159 (1985); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

15 **1. Fourth Amendment**

16 The Court notes that Plaintiff may be attempting to state an excessive force claim pursuant
17 to the Fourth Amendment. The Fourth Amendment requires police officers making an arrest to
18 use only an amount of force that is objectively reasonably in light of the circumstances as
19 perceived by a reasonable officer at the scene. *Blankenhorn v. City of Orange*, 485 F.3d 463, 477
20 (9th Cir. 2007). However, the “Fourth Amendment does not prohibit a police officer’s use of
21 reasonable force during an arrest.” *Tatum v. City of San Francisco*, 441 F.3d 1090, 1095 (9th Cir.
22 2006) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Plaintiff alleges that after a short
23 foot race, he was placed face down, hands extend above his head, Officer Alimboyah jumped on
24 his back, handcuffed him, and repeatedly punched him in the face and ribs causing him to bleed
25 from his right ear, and struck Plaintiff in his ribs and legs with Officer Alimboyah’s knee.
26 Plaintiff also alleges that Officer Miller punched him in the ribs and head causing swelling and a
27 cut to his forearm. The Court finds that Plaintiff has alleged sufficient facts to proceed with his
28 excessive force claim under the Fourth Amendment against Alimboyah and Miller.

1 As for his illegal search and seizure claim, Plaintiff claims that \$100 was taken from his
2 pants and not deposited in his account, used as evidence, or returned. Plaintiff also claims that
3 the traffic stop for which he was detained was not supported by probable cause and he was not
4 subsequently arrested for carjacking. The Fourth Amendment guarantees a citizen's right to be
5 free from "unreasonable searches and seizures." *U.S. Const. Amend. IV*. "A person is seized"
6 whenever an official restricts "his freedom of movement" such that he is "not free to leave."
7 *Brendlin v. California*, 551 U.S. 249, 254, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). The general
8 rule is that "seizures are 'reasonable' only if based on probable cause to believe that the
9 individual has committed a crime." *Bailey v. United States*, 568 U.S. 186, 192, 133 S.Ct. 1031,
10 185 L.Ed.2d 19 (2013). The Fourth Amendment "establishes the minimum constitutional
11 'standards and procedures'" for arrests and the ensuing detention. *Manuel*, 137 S.Ct. at 917
12 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)). Where a
13 plaintiff alleges a seizure or pretrial detention was not supported by probable cause, "then the
14 right allegedly infringed lies in the Fourth Amendment." *Id.* at 919. An alleged defect in the
15 legal process does not extinguish a plaintiff's Fourth Amendment claim or "convert that claim
16 into one founded on the Due Process Clause." *Id.*

17 The Court finds that Plaintiff has alleged sufficient facts to proceed with his illegal search
18 and seizure claim under the Fourth Amendment against Alimboyah and Miller. However,
19 Plaintiff's claim against Cannon is not sufficiently alleged to proceed. He claims that Cannon
20 lied in his report by claiming that Plaintiff confessed to carjacking. Plaintiff will be given leave
21 to amend if he believes he can state a plausible Fourth Amendment claim against Cannon.

22 **2. Fourteenth Amendment**

23 The Due Process Clause of the Fourteenth Amendment provides that no state shall
24 "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend
25 XIV, § 1. The Equal Protection Clause commands that no state shall "deny to any person within
26 its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. The purpose of
27 this Clause is to prevent intentional and arbitrary discrimination. *Engquist v. Oregon Dep't of*
28 *Agr.*, 553 U.S. 591, 611, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008).

1 Plaintiff's Amended Complaint states that he is seeking to bring both due process and
2 equal protection claims. However, well-established precedent indicates that Fourth Amendment
3 principles, rather than Fourteenth Amendment due process principles, govern pretrial deprivations
4 of liberty. *See, e.g., Manuel*, 137 S.Ct. at 917–19; *Albright*, 510 U.S. at 273–74, 114 S.Ct. 807
5 (noting that the Fourth Amendment, “not the more generalized notion of ‘substantive due
6 process,’ must be the guide” for analyzing such claims); *Galbraith v. County of Santa Clara*, 307
7 F.3d 1119, 1127 (9th Cir. 2002) (affirming dismissal of Fourteenth Amendment claim alleging
8 false information in warrant affidavit). As such, the Court construes his Fourteenth Amendment
9 claims as only alleging an equal protection claim as he has not stated a colorable due process
10 claim.

11 Plaintiff alleges that he was called the n-word during the traffic stop and that his girlfriend
12 was called a hood rat, a racially offensive term geared toward African American women by
13 Miller. The Court will permit his Fourteenth Amendment claim to proceed against Alimboyah
14 and Miller and grant leave to amend to the extent that Plaintiff believes he can assert additional
15 factual allegations to assert a due process claim.

16 **3. Qualified Immunity for Individual Defendants**

17 Plaintiff states that his claims against the individual officers are made both in their official
18 or individual capacity. “There is no longer a need to bring official capacity actions against local
19 government officials [in their official capacities], for under *Monell* . . . local government units can
20 be sued directly for damages and injunctive or declaratory relief.” *Kentucky v. Graham*, 473 U.S.
21 159, 167 n. 14 (1985). Because an official capacity suit against a municipal officer is equivalent
22 to a suit against the government entity, the court may dismiss the officer as a redundant defendant
23 where both the officer and the entity are named. *Center for Bio–Ethical Reform, Inc. v. Los*
24 *Angeles Cnty. Sheriff Dept.*, 533 F.2d 780, 799 (9th Cir.2008). Accordingly, the Court will not
25 permit any claim against Miller, Alimboyah, and Cannon in their official capacity to proceed at
26 this point; to the extent that Plaintiff wishes to amend to clarify the capacity under which he is
27 asserting claims against the individual defendants, he will be provided with an opportunity to do
28 so.

1 With respect to the officers named in their individual capacity, when government officials
2 abuse their offices, actions for damages under Section 1983 may offer injured parties the only
3 avenue for vindicating violations of their constitutional rights. *See Harlow v. Fitzgerald*, 457
4 U.S. 800 (1982). However, permitting damages suits against government employees “‘can entail
5 substantial social costs, including the risk that fear of personal monetary liability and harassing
6 litigation will unduly inhibit officials in the discharge of their duties.’” *Lombardi v. City of El*
7 *Cajon*, 117 F.3d 1117, 1125 n. 5 (9th Cir. 1997) (quoting *Anderson v. Creighton*, 483 U.S. 635,
8 638 (1987)). Courts have responded to these competing interests by providing qualified
9 immunity to government officials who act reasonably in performing discretionary functions. *Id.*
10 Qualified immunity entitles government officials to “an immunity from suit rather than a mere
11 defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Whether qualified immunity
12 applies is a legal question to be decided early in litigation. *See Ortega v. O’Connor*, 146 F.3d
13 1149, 1154 (9th Cir. 1998). There is a question as to whether qualified immunity applies to the
14 individual defendants so the Court will permit Plaintiff’s claims to survive screening at this point.

15 **4. Municipal Immunity**

16 In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held
17 that a municipality could be held liable under Section 1983 if an official policy or custom directly
18 caused the violation of an individual's constitutional rights. However, a municipality cannot be
19 held liable simply because it employs an officer who commits a constitutional tort. *Hervey v.*
20 *Estes*, 65 F.3d 784, 791 (9th Cir.1995) (citing *Monell*, 436 U.S. at 690–91, 98 S.Ct. 2018). Such
21 discretionary actions of municipal employees, even when unconstitutional, generally are not
22 chargeable to the municipality under Section 1983. *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th
23 Cir. 1992).

24 To impose 1983 liability on a local governmental entity, such as NLVPD in this case, a
25 plaintiff must establish “(1) that he possessed a constitutional right of which he was deprived; (2)
26 that the municipality had a policy; (3) that this policy ‘amounts to deliberate indifference’ to the
27 plaintiff’s constitutional right; and (4) that the policy is the ‘moving force behind the
28 constitutional violation.’” *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir.1992) (quoting *City of*

1 *Canton v. Harris*, 489 U.S. 378, 389–91 (1989)). A plaintiff cannot prove the existence of a
2 municipal policy or custom based only on the occurrence of a single constitutional violation by a
3 law enforcement officer. *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233 (9th Cir. 1989).
4 However, a policy “may be inferred from widespread practices or ‘evidence of repeated
5 constitutional violations for which the errant municipal officers were not discharged or
6 reprimanded.’” *Nadell v. Las Vegas Metro. Police Dept.*, 268 F.3d 924, 929 (9th Cir. 2001)
7 (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1349 (9th Cir. 1992)).

8 A plaintiff need not show that a municipality affirmatively encouraged officers to take the
9 lives of citizens; rather a municipality may be liable under Section 1983 for constitutional injuries
10 inflicted by its officers if it fails to adequately guard against such injuries through training and
11 supervision. *See City of Canton*, 489 U.S. at 388. The need for more or different training may be
12 so obvious, and the inadequacy so likely to result in violations of constitutional rights, that the
13 municipality may be said to have displayed “deliberate indifference.” *Id.* at 390. A municipality
14 will be held to a “constructive notice” standard for failing to take corrective measures where
15 information about officer misconduct plainly indicates a need for such measures. *See Paiva*, 939
16 F.Supp. 1493–94. Here, the Court will permit the Fourth Amendment claims to proceed against
17 the North Las Vegas Police Department past this screening process given that Plaintiff alleges it
18 failed to adequately safeguard against excessive force and illegal search and seizure due to
19 standing policies and procedures and history of failure to train its officers.

20 **C. Proposed Summons**

21 Plaintiff also submitted a proposed summons for Defendant North Las Vegas Police
22 Department (ECF No. 17) on February 18, 2020. Plaintiff’s summons is ordered to be issued by
23 the Clerk of the Court and directed to the U.S. Marshal’s Office.

24 **II. CONCLUSION**

25 IT IS THEREFORE ORDERED that David L. Reed’s Motion/Application for Leave to
26 Proceed *in forma pauperis* (ECF No. 9) without having to prepay the full filing fee is
27 GRANTED. Plaintiff is permitted to maintain this action to conclusion without prepayment of
28 fees or costs or the giving of security for fees or costs. This order granting *in forma pauperis*

1 status does not extend to the issuance of subpoenas at government expense.

2 IT IS FURTHER ORDERED that under 28 U.S.C. § 1915(b)(2), the Nevada Department
3 of Corrections shall pay to the Clerk of the United States District Court, District of Nevada, 20%
4 of the preceding month's deposits from the account of **David L. Reed**, #79594, in the months that
5 the account exceeds \$10.00, until the full \$350.00 filing fee has been paid for this action. If
6 plaintiff should be transferred and become under the care of CCDC, NDOC is directed to send a
7 copy of this order to the attention of the CCDC Accounting Supervisor, 330 S. Casino Center
8 Blvd., Las Vegas, NV 89101, indicating the amount that plaintiff has paid toward his filing fee, so
9 that funds may continue to be deducted from plaintiff's account. The Clerk shall send a copy of
10 this order to the Chief of Inmate Services for the Nevada Department of Corrections, P.O. Box
11 7011, Carson City, NV 89702.

12 IT IS FURTHER ORDERED that even if this action is dismissed, or is otherwise
13 unsuccessful, the full filing fee still shall be due, under 28 U.S.C. § 1915, as amended by the
14 Prisoner Litigation Reform Act.

15 IT IS FURTHER ORDERED that:

- 16 1. Plaintiff's Fourth Amendment claim for excessive force against Alimboyah, Miller, and
17 North Las Vegas Police Department is permitted to proceed.
- 18 2. Plaintiff's Fourth Amendment claim for illegal search and seizure against Alimboyah,
19 Miller, and North Las Vegas Police Department is permitted to proceed.
- 20 3. Plaintiff's Fourteenth Amendment claim for violation of equal protection is permitted
21 to proceed against Alimboyah, Miller, and North Las Vegas Police Department.
- 22 4. Plaintiff's claims against the individual defendants in their official capacity, claims
23 against Cannon, and Fourteenth Amendment claim for violation of due process are
24 dismissed without prejudice.
- 25 5. Plaintiff may submit a Second Amended Complaint by **April 14, 2020** to correct the
26 deficiencies identified. If he chooses not to submit a Second Amended Complaint, then
27 he will proceed on the operate Amended Complaint with the claims identified above
28 that are permitted to proceed.

- 1 6. If Plaintiff chooses to amend the complaint, Plaintiff is informed that the Court cannot
2 refer to a prior pleading (i.e., the amended complaint) in order to make the second
3 amended complaint complete. This is because, as a general rule, an amended complaint
4 supersedes the original complaint. Local Rule 15-1(a) requires that an amended
5 complaint be complete in itself without reference to any prior pleading. Once a plaintiff
6 files an amended complaint, the original complaint no longer serves any function in the
7 case. Therefore, in an amended complaint, as in an original complaint, each claim and
8 the involvement of each Defendant must be sufficiently alleged.
- 9 7. The Clerk of the Court shall issue Summons to Defendants and deliver the same to the
10 U.S. Marshal for service. The Clerk of the Court shall also deliver a copy of the
11 amended complaint (ECF No. 9) to the U.S. Marshal for service.
- 12 8. Plaintiff shall have thirty days in which to furnish the U.S. Marshal with the required
13 Form USM-285.¹ Within twenty days after receiving from the U.S. Marshal a copy of
14 the Form USM-285, showing whether service has been accomplished, Plaintiff must file
15 a notice with the court identifying whether defendant was served. If Plaintiff wishes to
16 have service again attempted on an unserved defendant, a motion must be filed with the
17 Court identifying the unserved defendant and specifying a more detailed name and/or
18 address for said defendant, or whether some other manner of service should be
19 attempted.
- 20 9. Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service must be
21 accomplished within 90 days from the date this order is entered.
- 22 10. From this point forward, Plaintiff shall serve upon Defendants, or, if appearance has
23 been entered by counsel, upon the attorney(s), a copy of every pleading, motion, or other
24 document submitted for consideration by the court. Plaintiff shall include with the
25 original papers submitted for filing a certificate stating the date that a true and correct
26 copy of the document was mailed to Defendants or counsel for Defendants. The Court
27 may disregard any paper received by a District Judge or Magistrate Judge that has not

28 ¹ The USM-285 form is available at www.usmarshals.gov/process/usm285.pdf.

1 been filed with the Clerk, and any paper received by a District Judge, Magistrate Judge,
2 or the Clerk that fails to include a certificate of service.

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4 DATED: March 25, 2020

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8 DANIEL J. ALBREGTS
9 UNITED STATES MAGISTRATE JUDGE
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